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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 543

RICHARD GRIFFIN,
Petitioner,

vs.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

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The Daily Record Co., Baltimore 3, Md.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, RICHARD GRIFFIN, respectfully prays for a Writ of Certiorari to the Court of Appeals of Maryland, to review the per curiam opinion of that Court entered in the above cause on December 12, 1952, in denying a motion for reargument, and attempting a clarification of the original opinion filed on November 11, 1952.

JURISDICTION

Jurisdiction is conferred upon the Supreme Court to review this case by Writ of Certiorari under Section 1254 of the Judicial Code (Title 28, U. S. C. A.), as enacted June 25, 1948.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Maryland Court of Appeals, in its Opinion upholding a judgment of conviction of violation of the lottery and gaming laws, both misdemeanors, departed from the well recognized principles of arrests for misdemeanors committed in the presence of an officer under the Common Law, and substituted therefor the invasion of a private dwelling without a warrant, and justified the entry by the officer because the officer, in the circumstances of the instant case, had a sincere belief that a crime (misdemeanor) was being committed within the dwelling house of the Petitioner.

QUESTIONS PRESENTED

Whether the Maryland Court of Appeals erred in upholding the Trial Court's action in admitting in a trial for statutory misdemeanors, and overruling an objection and refusing to exclude evidence obtained by an illegal search by a police officer of a dwelling house, based upon said officer's testimony that while outside said dwelling he had cause to believe, and did believe, that the lottery and gaming statutes (both misdemeanors) were being violated within said dwelling.

REASONS FOR GRANTING THE WRIT

1. The Maryland Court of Appeals has frequently and consistently held that in trial for a misdemeanor evidence obtained by search of a dwelling house, without a search and seizure warrant, as occurred in this case, is inadmissible.

2. The Maryland Court of Appeals has consistently decided that the Bouse Act (Maryland Code of Public General Laws, 1951, Art. 35, Sec. 5) makes inadmissible in the trial of misdemeanors, evidence procured by any illegal search

or seizure or — and search and seizure prohibited by the Declaration of Rights of the Maryland Constitution (Articles 22 and 26).

3. Because the Maryland Court of Appeals has consistently held that the Search and Seizure Law (Act of 1939, Maryland Code of Public General Laws, 1951, Art. 27, Sec. 306) authorizes issuance of a search warrant upon a showing by sworn application of "probable cause" to believe that any misdemeanor or felony is being committed, the "basis" of the probable cause for believing in the existence of "the grounds for such search" to be described in the search warrant. This statutory procedure was ignored in the instant case.

4. The Maryland Court of Appeals has consistently held that Articles 22 and 26 of the Maryland Declaration of Rights are in pari materia with the Fourth and Fifth Amendments to the Constitution of the United States, and that the immunities thereby guaranteed are fairly summed up in the Bouse Act, Article 35, Section 5, of the Maryland Code of Public General Laws. In the instant case, the Court of Appeals of Maryland fails to follow or discuss, but ignores *McDonald v. United States*, 335 U. S. 451, a case on all fours as to circumstances with the present case, where the conviction was reversed because of the search of a private dwelling, without a search warrant, where too, the officers had the same sincere belief based on their vision that the lottery laws were being violated.

5. The Maryland Court of Appeals, a few years before the present case was presented to it, expressly held that the Bouse Act (Art. 35, Sec. 5), and the Act of 1939 (Art. 27, Sec. 306) amount to adoption *pro tanto* of the Supreme C[illegible]rt decisions under the Fourth Amendment, and yet ig-

nored the McDonald case, supra, decided under the Fourth Amendment.

6. The per curiam opinion of the Maryland Court of Appeals in the present case sets up a rule applicable to this isolated case, and thus deprives the petitioner of due process of law, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE your Petitioner prays that a Writ of Certiorari issue to the Court of Appeals of Maryland, commanding that Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Court of Appeals, had in this case, to the end that the judgment of the Court of Appeals of Maryland may be reversed, and that the petitioner be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

At the outset of the trial of this case, in the Criminal Court of Baltimore City, counsel for defendant (petitioner) objected to all testimony, stating that he contested the legality of the search (App. 6).

The uncontradicted evidence shows that about 11:00 a. m., on December 15, 1951, Officer Thomas McKew, accompanied by several other members of the Baltimore Police Department, was in the vicinity of No. 1002 North Durham Street; they did not have a search and seizure warrant for the premises. They observed three men enter the premises through the rear door. One officer stood in the alley, while Officer McKew looked in the side window of the rear of the premises. He testified that he looked through a flimsy curtain which covered the window, and saw one man

seated at a table with his back to the window, and several other men standing in there, and on the table was a pad of slips and an open book, which the witness characterized as a "conventional" lottery book. He went to the rear door and saw a bell and button, and as he was ready to push that, a colored man came to the door to whom he showed his badge and identified himself; the colored man then admitted him, and as he went in he recognized Richard Griffin (Petitioner) seated at a table, on which was this lottery book and these slips pinned together. Officer McKew identified himself to the people in the room, and sent out for the two other police officers. (At the trial, and before the examination of witnesses began, Petitioner's counsel objected to all the testimony, and announced he contested the legality of the search) (App. 6). Said lottery book and pad of slips were then admitted in evidence, as were another lottery book and four slips containing race horse bets found on the second floor of the premises (App. 8-10).

On cross-examination, the witness testified that before entering the premises, and while peering through the curtain over the rear window, he could not tell what was in the open book, nor could he then read what, if anything was written on the slips on the table (App. 10). He knew it was a private home; he did not have a search warrant; he had tried before to get a search warrant (App. 11). He was the only officer who looked through the window (App. 12).

The testimony of Officer Cohen, who accompanied him, corroborated that of Officer McKew (App. 12-13).

The Petitioner, Richard Griffin, testified that on the occasion of the raid, he was seated at the table, when as a fellow went out the door, a small-built fellow came in by him, and he said, "everybody stand still, don't anybody

move". This officer then backed back, and turned through the dining room, and opened the out door and let in three other officers; that the officers then searched the house (App. 13-14). On cross-examination, the witness testified that the lottery book and slips were on the table at which he was sitting; that the table was about four feet from the window (App. 15).

Counsel for defense, at the conclusion of the testimony, moved to strike out the testimony. The Court overruled said motion, and ruled that it was a legal arrest. A motion for a directed verdict of acquittal was then made and overruled (App. 15).

SPECIFICATION OF ERRORS

(a) The Court of Appeals of Maryland erred in upholding the admission in evidence, over the objection of the Petitioner (Defendant), and the refusal by the Trial Court to strike out the lottery paraphernalia seized in his (Petitioner's) home after entering same without a search and seizure warrant, thereby ignoring the provisions of the Bouse Act (Maryland Code of Public General Laws, 1951, Art. 35, Sec. 5), which forbids the introduction in the trial for a misdemeanor of evidence illegally obtained, and ignoring the guarantees provided and embraced in Article 22 and 26 of the Declaration of Rights, Constitution of Maryland, and the Fourth and Fifth Amendments to the Constitution of the United States.

(b) The Maryland Court of Appeals erred in its per curiam opinion, denying Petitioner's (Appellant's) Motion for Reargument, which per curiam opinion shows that the case was decided by a rule applicable only to it, thus depriving Petitioner of due process of law under the Bouse Act (Maryland Code of Public General Laws, 1951, Art. 35,

Sec. 5), and under Articles 22 and 26 of the Maryland Declaration of Rights, and under the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

> "Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Articles 22 and 26, Declaration of Rights, Constitution of Maryland:

> "Art. 22. That no man ought to be compelled to give evidence against himself in a criminal case."
>
> "Art. 26. That all warrants without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person, in special, are illegal, and ought not to be granted."

The Bouse Act (Maryland Code, 1951, Art. 35, Sec. 5), provides:

> "5. No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure, or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible, if procured by, through, or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case."

ARGUMENT

A.

THE CRUX OF THE OPINION FILED BY THE MARYLAND COURT OF APPEALS IGNORED PETITIONER'S RIGHTS UNDER THE BOUSE ACT (CODE, 1939, ART. 35, SEC. 5), AS WELL AS THE PROHIBITIONS OF ARTICLES 22 AND 26 OF THE MARYLAND DECLARATION OF RIGHTS, AND THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

No contention was made in the instant case that Appellant (Petitioner) consented to the invasion of his home and the search thereof. The fact that the rear door to the premises was opened by an unidentified colored man who

admitted Officer McKew after he had shown him his badge and identified himself, did not in any way lessen the violation of Appellant's constitutional rights by invading his home without a search and seizure warrant.

Thus in *Gorman v. State,* 161 Md., at page 704, the Court said:

> "It is true the door was not locked or fastened, but partially open, and he was not required to burst open the door; but as stated in the authorities from which we have quoted, the bursting open of the door was not the essence of the offense, it was the invasion of the privacy of the defendant's home."

In *Bass v. State,* 182 Md. 496 at page 500, the Court said:

> "Articles 22 and 26 of the Maryland Declaration of Rights are in *pari materia* with the Fourth and Fifth Amendments to the Constitution of the United States, (*Blum v. State,* 94 Md. 375, 51 A. 26, 56 L. R. A. 322), and the immunities thereby guaranteed are fairly summed up in Article 35, Section 5, of the Maryland Code."

In *Wood v. State,* 185 Md. 280, at page 285, the Court said:

> "The Bouse Act (Art. 35, Sec. 5) makes inadmissible in the trial of misdemeanors evidence procured by 'any illegal search or seizure or — and search and seizure prohibited by the Declaration of Rights'. The Act of 1939 (Art. 27, Sec. 306) authorizes issuance of a search warrant upon a showing by sworn application of 'probable cause' to believe that any misdemeanor or felony is being committed, the 'basis' of the probable cause for believing in the existence of the 'grounds for such search' to be described in the search warrant * * *."
>
> "The Bouse Act and the Act of 1939 amount to adoption *pro tanto* of the Supreme Court decisions under the Fourth Amendment * * *."
>
> "For the meaning of * * * illegal search and seizure in the Bouse Act, we must hark back to the common law as embodied by construction in the Fourth Amendment."

In *Johnson v. United States,* 333 U. S. 10, at page 14, the Court said:

> "Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

In the recent case of *McDonald v. United States,* 335 U. S. 451, the Supreme Court, in referring to the Fourth Amendment to the United States Constitution, said:

> "It marks the right of privacy as one of the unique values of our civilization, and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation. And the law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation when it is tendered in a Federal court."

Officer McKew's attempted justification of his invasion of Appellant's home without a search and seizure warrant is based on what he claims he could see while standing outside the premises peering through a curtain over the side kitchen window, i. e., a man (later learned by him to be the Appellant), seated at a kitchen table, upon which he could see a pad of slips and an open book, characterized by him as a "conventional" lottery book. On cross-examination, the witness admitted that from his position at the rear window, outside the premises, he could not see anything written on said slips (App. 10).

It is submitted that the officer, at the time he invaded Appellant's home, had no valid basis in law for the intrusion. Otherwise the constitutional right of people to be secure in their homes would be undermined.

In *Johnson v. United States,* 162 F. 2d 562, decided June 20, 1947, Stephens, Circuit Judge, speaking for the Ninth Circuit, said:

> "The search was not unreasonable or illegal provided the circumstances just briefly related were sufficient to constitute probable cause for the arrest. *Kwong How v. United States,* 9 Cir. 71 F. 2d 71; *Garske v. United States,* 8 Cir., 1 F. 2d 620; *Carroll v. United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790; *Stacey v. Emery,* 97 U. S. 642, 24 L. Ed. 1035; *McCarthy v. DeArmit,* 99 Pa. 63; *Green v. United States,* 8 Cir. 289 F. 236; *Pong Ying v. United States,* 3 Cir., 66 F. 2d 67."
>
> * * * * * *
>
> "Of course, there is nothing in the statutory law to the effect that the sense of smell alone is not sufficient to constitute probable cause, and, therefore, any such holding in a given case is premised upon the facts of the given case. We venture to say that the smell of opium fumes may in some circumstances be second only to the well-known maxim that 'Seeing is believing'. In this case we find three experienced officers being directed to the door of appellant's room by the sense of smell, and there experiencing the current of the fumes coming from the cracks of an ill-fitting and loose-paneled door. Before admission, there ensues some minutes of scurrying within; when admitted, appellant is found to be alone. No one has left the room because all exits have been under observation. All of this follows the informer's 'tip'. The whole action on behalf of the officers has been prompt and delay for the purpose of securing warrant for arrest and search in the circumstances probably would have been fatal to the detection of the suspected crimes."

When the Johnson case, supra, was reviewed on certiorari by the Supreme Court of the United States, 333 U. S. 10, 17, in reversing the judgment of the Ninth Circuit, Mr. Justice Jackson, speaking for the Court; said:

> "An officer gaining access to private living quarters under the color of his office and of the law which he personified, must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, papers, and effect, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law'."

There was no emergency in the instant case. The premises were a private dwelling known to Officer McKew as such. There had been no shot heard by the officers while outside; no cry of help or murder. The officer testified that he had previously tried to get a warrant to search the premises (App. 11).

In *Gorman v. State,* 161 Md. 700, on the day preceding the entry of defendant's house without a search warrant, the officer had observed the comings and goings of persons therefrom. The Court (page 704), held:

> "If upon that information he could have procured a warrant to search the defendant's home, he should have done so before entering the premises of the defendant. If upon such information he could not have procured a warrant, then he was not justified in attempting a search of the house without a warrant * * *."

The Court held the evidence obtained as a result of the search to be inadmissible in evidence, and cited *Agnello v. United States,* 269 U. S. 20, wherein a search and seizure in a dwelling house without a search warrant was held to

be in violation of the Fourth Amendment to the Federal Constitution, while the admission of the evidence obtained by such search was held to violate the Fifth Amendment.

In the Agnello case, supra, Mr. Justice Butler, in delivering the Opinion of the Court, at page 33, said:

> "Safeguards similar to the Fourth Amendment are deemed necessary and have been provided in the Constitution of laws of every state of the Union. We think there is no State statute authorizing the search of a house without a warrant, * * *. *Save in certain cases incident to arrest, there is no sanction in the decisions of the courts, Federal or State, for the search of a private dwelling house without a warrant.*"
>
> "*Absence of any judicial approval is persuasive authority that it is unlawful.*" See *Entick v. Carrington*, 19 Howard's State Trials, 1030, 1066.
>
> "*Beliefs however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Italics added.)
>
> Citing:
>
> Temperani v. U. S., 229 Fed. 365;
> U. S. v. Rembert, 284 Fed. 996, 1000;
> Connelly v. U. S., 275 Fed. 509;
> McClurg v. Brenton, 123 Ia. 368, 372;
> Peoples v. Margolis, 200 Mich. 431;
> Childers v. Commonwealth, 198 Ky. 848;
> State v. Warfield, 184 Wis. 56.

The following excerpt from the Opinion in *Alvau v. United States*, 33 F. 2d 467, 470, is appropriate herein:

> "There was here no emergency; it is not a case of a rapidly moving automobile or other instrumentality employed in the violation of law, or an outcry from a closed building of murder, or robbery, where immediate action is often necessary."

A case on all fours in principle is that of *McDonald v. United States*, 335 U. S. 451, wherein police officers, suspecting that petitioner, McDonald, was operating an illegal lottery, had kept under surveillance for two months his comings and goings from a rooming house wherein he had a room, when, thinking that they detected from outside the house the sound of an adding machine, entered the rooming house by climbing through a window, without warrant for search or arrest, and then proceeded to petitioner's room, where one of the officers stood on a chair and looked through the transom over the door thereto, observed McDonald and his co-petitioner with numbers, slips, and money piled on the table, and adding machines. They demanded and obtained entrance, and seized the machines, papers, and money, which were in plain view. These articles were admitted in evidence, over the objection of petitioners, who were convicted. The Court held that the seizure was in violation of the Fourth Amendment, the seized articles were not admissible in evidence against McDonald, and his conviction could not be sustained.

In the McDonald case, the prosecution sought to build the lawfulness of the search on the lawfulness of the arrest, and so to justify the search and seizure without a warrant, by reasoning as follows: that looking over the transom of the door to petitioner's room was not a search, for the eye cannot commit the trespass condemned by the Fourth Amendment; that since the officers observed McDonald in the act of committing an offense, they were under a duty then and there to arrest him; that the arrest being valid the search incident thereto was lawful.

The Court (page 454) answered this reasoning as follows:

> "We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result.

"This is not a case where the officers, passing by on the street, heard a shot and a cry for help and demanded entrance in the name of the law * * *

"Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. * * * Moreover, when we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. * * *"

The Court in the above case (page 455) further said:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals, nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police, acting on their own, cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement, and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

The "numbers" lottery is not one which endangers life or limb or the peace and good order of the community, even if it continued another day or two; neither was the racket one the defendant was likely to suddenly abandon. Conduct of the "numbers" lottery is not a solitary vice, practiced in secrecy, and discoverable only by crashing into dwelling houses. The above was pointed out by Mr. Justice

Jackson in his concurring opinion in the McDonald case, supra, page 459, which also states (page 460):

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."

B.

THE MARYLAND COURT OF APPEALS, IN ITS PER CURIAM OPINION DENYING APPELLANT'S (PETITIONER'S) MOTION FOR REARGUMENT, SETS UP A RULE APPLICABLE ONLY TO THE PETITIONER'S CASE, AND THUS DENIES HIM OF DUE PROCESS OF LAW, AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Petitioner, as Appellant in the above case, within thirty (30) days after the Opinion as provided by the Maryland Court of Appeals Rule 43, filed a Motion for Reargument, as follows:

"First

> "The crux of the decision in the instant case is to be found in the following excerpts from the Opinion:
>
> > 'We specifically hold that it is lawful for a police officer without a warrant to enter and search a dwelling when he can see from the outside that a crime is being committed inside.
> >
> > * * * * * *
> >
> > 'In deciding whether an officer was justified in making an arrest without a warrant for a misdemeanor, the criterion is whether the circumstances presented to the officer through his senses were sufficient to justify a sincere belief that the accused was committing the misdemeanor in his presence.'

"Applying the above principles to the facts of the case, the Opinion states:

> 'In this case, the officer had been watching Appellant's house on more than one occasion, believing that it was a "pickup station" for gambling operations. After he saw the three men enter the back door of the house, he glanced through the side window, and saw the open book and slips laying on the table. He swore in the Court below that he knew from his experience in lottery cases that the book and the slips were being used for the purpose of a lottery. We think the trial judge was right in finding that the circumstances presented to the officer were sufficient to justify his sincere belief that the lottery law was being violated in his presence.
>
> 'For these reasons, we hold that the search and seizure were lawfully made by the police. As the judge ruled correctly in admitting the gambling paraphernalia in evidence, the three judgments of conviction must be affirmed.'

"Under this decision, logically applied, we submit, a citizen's home may be invaded at any hour of the day or night by a police officer, without a search warrant, provided only that the circumstances presented to the officer through one of his five senses were sufficient to justify in him a sincere belief that the citizen was committing a misdemeanor within the said home.

"Whether or not his 'sincere belief' was justified under the circumstances, can be subsequently passed upon by a Trial Court, and on appeal by the Court of Appeals of Maryland."

The per curiam opinion filed on December 12, 1952, by the Maryland Court of Appeals in denying said Motion for Reargument, reads as follows:

"Defendant complains that the crux of the decision in this case is to be found in the following statements

in the opinion: 'We specifically hold that it is lawful for a police officer without a warrant to enter and search a dwelling when he can see from the outside that a crime is being committed inside. * * * In deciding whether an officer was justified in making an arrest without a warrant for a misdemeanor, the criterion is whether the circumstances presented to the officer through his senses were sufficient to justify a sincere belief that the accused was committing the misdemeanor in his presence'. The complaint is that the second sentence quoted cuts down the first by broadening the right of arrest from arrest for a misdemeanor which the officer had probable cause to believe was committed. This was not the purpose and is not the effect of the sentence complained of. We did not broaden the right to arrest without a warrant, but merely undertook to explain, in the circumstances of the instant case, the evidence sufficient to show that a misdemeanor had been committed in the officer's presence. The event showed conclusively that a misdemeanor had been committed in close proximity to the officer. The officer testified that he saw the books and slips used for the purpose of a lottery. Appellant claimed he could not see this. If the officer had been blind, completely intoxicated, or otherwise unconscious, he could not have seen what he testified to. The sentence of which Appellant complains merely suggests a measure or test of testimony which an officer may honestly give in the circumstances, and which the trier of facts and this Court may accept as legally sufficient and true in fact. To this extent we did not subtract from, but added to, the legal requisites of an arrest without a warrant."

The Maryland Court of Appeals, in the above per curiam opinion, thus ignores the fact that the officer, while in somewhat close proximity to the alleged misdemeanor, was separated therefrom by the walls of Petitioner's dwelling, and entered same without first obtaining a search warrant.

Neither the original opinion, nor the per curiam option, lays down a rule upon which future cases could be decided, but decides the case upon a rule applicable to Petitioner's case alone, and thus denied the Petitioner "due process" of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

The conviction of Richard Griffin on a charge of violations of the lottery and gaming statutes resulted in a verdict of guilty, and sentence and judgment in the Criminal Court of Baltimore, only because of the admission over objection and refusal to strike out the evidence obtained as a result of the invasion of Petitioner's dwelling house without a search warrant, and without the presence of any emergency to justify such entry. It deprived the Petitioner of the protection afforded by the Maryland statutes, the Declaration of Rights of the Maryland Constitution, all of which, by decisions of the Maryland Court of Appeals, are held to be in pari materia with the Fourth and Fifth Amendments to the Constitution of the United States.

Such procedural conduct was a denial of Due Process of Law guaranteed unto the Petitioner by the Fourteenth Amendment to the Constitution of the United States, and for this reason, the judgment should be reversed.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 543

RICHARD GRIFFIN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Court of Appeals of Maryland. Petitioner was convicted in the Criminal Court of Baltimore upon an indictment which charged him with violation of the Gaming Laws of the State of Maryland (1-6).* He received a sentence of nine months in the Maryland House of Correction and was fined $3,000. Petitioner appealed his conviction to the Court of Appeals of Maryland, contending that the evidence introduced against him was improperly admitted by the trial court because received by an illegal search and seizure.

* All references are to the Appendix to Petitioner's Brief.

The judgment was affirmed by the Court of Appeals, ... Md. ...., 92 A. 2d (Adv. Sh.) 743. Thereafter, Petitioner filed a Motion for Reargument with the Court of Appeals of Maryland which was denied, Md. ...., 92 A. 2d (Adv. Sh.) 747.

QUESTIONS PRESENTED

I.

Do the Fourth, Fifth or Fourteenth Amendments to the Constitution of the United States serve to exclude evidence secured by an unreasonable search and seizure in prosecutions for crimes in the State Courts?

II.

Does the Opinion of the Court of Appeals of Maryland establish a rule of law which is applicable only to this Petitioner's case, thereby denying Petitioner due process of law as guaranteed in the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF FACTS

On December 15, 1951, Officer Thomas McKew, Officer John Goodrich and Sgt. Robert T. Cohen of the Baltimore City Police Department, were in the vicinity of 1002 North Durham St. (6).

They observed three men enter the rear door of the premises. Officer McKew looked in the side window at the rear of the house and saw a number of people standing in a room. One man was seated at a table which was not more than 2 feet from the window (7). The man had his back to the window so that the officer could not discern his features (11-12). There was a flimsy curtain over the window which could be seen through, and lighting conditions

were good. The officer observed on the table a pad of slips and a conventional type lottery book (7, 10). Officer McKew had been on the police force for over five years, two of which he had spent in plainclothes working on lottery and gambling cases (7). He did not have a search warrant for the premises.

After observing the slips and lottery book through the window, Officer McKew went to the door which was opened by a colored man. The officer identified himself as a policeman and the man admitted him. As he entered the room, Officer McKew recognized the man seated at the table as the Petitioner. He recognized him as the man who had been involved in another case (8). Petitioner and the other people were in a room adjoining the one which the officer entered. The door between the two rooms was open. On the table lay a lottery book and lottery slips. This was the same material the officer had observed through the window. Officer McKew asked Petitioner whether he had anything else and Petitioner answered that there was more upstairs. Petitioner took the Officer upstairs, where he found more gambling paraphernalia (8, 9).

Sgt. Cohen testified that he entered the premises a short time after Officer McKew, and that Petitioner was seated at a table on which lay a lottery book and lottery slips (13). The Sergeant asked Petitioner how long he had been "back in the numbers business", and Petitioner answered "two weeks". Petitioner stated that it was his operation and no one else was involved in it. Petitioner and Officer McKew went upstairs and the officer returned with more lottery slips, a lottery book and horse bets.

Petitioner testified that he was seated at the table in the room and was in the company of a number of his friends.

When the officer walked in, he told everyone not to move and opened the backdoor to admit the other two officers. The officers then searched the house, both upstairs and down. Petitioner denied that he informed the officers that there was anything upstairs, or that he conducted the officers upstairs (14). He admitted that the lottery paraphernalia had been in his possession (15).

ARGUMENT

I.

THERE IS NOTHING IN THE CONSTITUTION OF THE UNITED STATES WHICH REQUIRES THE EXCLUSION OF EVIDENCE SECURED BY AN UNREASONABLE SEARCH AND SEIZURE WHERE SUCH EVIDENCE IS INTRODUCED IN A CRIMINAL PROSECUTION IN A STATE COURT.

Petitioner argues that the evidence which was introduced against him was secured by an unreasonable search and seizure and that its admission in evidence deprived him of his rights under the Fourth and Fifth Amendments to the Federal Constitution. He cites a number of cases in which this Court has held that, under the Constitutional provisions above mentioned, evidence so obtained may not be admitted in criminal prosecutions in the Federal Courts. The present case does not involve such a prosecution but rather involves a prosecution by State authorities in a State Court.

It is, of course, well settled that the Fourth and Fifth Amendments to the Federal Constitution are limitations on Federal power, which do not apply to the States, and that, in a prosecution in the State courts, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. *Stefanelli v. Minard,* 342 U. S. 117, 96 L. Ed. 138; *Wolf v. Colorado,*

338 U. S. 25, 33, 93 L. Ed. 1782; *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575. For the sake of brevity, Respondent will not discuss the question whether the evidence introduced in this case would have been inadmissible had the prosecution occurred in a Federal Court. That question is not important for present purposes.

II.

THE OPINION OF THE COURT OF APPEALS OF MARYLAND WHICH AFFIRMED PETITIONER'S CONVICTION DID NOT ANNOUNCE A RULE OF EVIDENCE APPLICABLE SOLELY TO PETITIONER'S CASE.

On appeal from his conviction, Petitioner argued that when the officer peered through the window of Petitioner's home, his senses did not perceive that which would justify the arrest and search. The Court of Appeals in affirming specifically held that "it is lawful for a police officer to enter and search a dwelling when he can see from the outside that a crime is being committed inside." *Fleming v. State, supra,* 92 A. 2d (Adv. Sh.) at page 746. Petitioner now argues that the Court of Appeals set forth in its opinion a rule of evidence applicable to Petitioner only. If this argument were supported by the facts Respondent readily agrees that a serious question concerning a denial of due process would be presented. However, it is clear from both the original opinion of the Court of Appeals and its opinion on reargument that the law under which the evidence was held to be admissible has been applied in past decisions of that Court and will be applied in future decisions.

Prior to the enactment of Section 5 of Article 35 of the Annotated Code of Maryland (1951 Ed.) the Court of Appeals of Maryland had held that where evidence offered

in a criminal trial is otherwise admissible, it would not be rejected because it was obtained illegally. *Meisinger v. State,* 155 Md. 195, 141 A. 536; *Heyward v. State,* 161 Md. 685, 158 A. 897; *Baum v. State,* 163 Md. 153, 161 A. 244. This is still the rule in prosecutions for felonies in Maryland. See *Delnegro v. State,* .... Md. ...., 81 A. 2d 241, 244. Article 35, Section 5, *supra,* which was enacted in 1929, changed the common law rule with reference to prosecutions for misdemeanors. It provides that in prosecutions for misdemeanors evidence secured by an illegal search and seizure or by a search and seizure prohibited by the Bill of Rights of Maryland shall be inadmissible.

Since the enactment of Article 35, Section 5, the Court of Appeals of Maryland has consistently held that where a misdemeanor is committed in the presence of an officer, he has the right to arrest the offender without a warrant and, "has the right to search a person lawfully arrested while committing a crime, and also to search where the arrest is made, in order to find and seize things connected with the crime as its fruits or as the means by which it was committed." *Fischer v. State,* .... Md. ...., 74 A. 2d 34, 36; *Rucker v. State,* .... Md. ...., 76 A. 2d 572, 573; *Smith v. State,* 191 Md. 329, 62 A. 2d 287, 292; *Silverstein v. State,* 176 Md. 533, 541, 6 A. 2d 465.

The test applied to determine the circumstances under which an offense may be considered committed in the presence of an officer has been consistently stated as in the case of *Bass v. State,* 182 Md. 496, 505, 35 A. 2d 155:

> "* * * it is settled in Maryland that an offense is considered as taking place within the 'presence' or 'view' of an officer when his senses afford him knowledge that one is being committed. In such a situation the presence of the officer is rightful and he may arrest

the offenders without a warrant. *Silverstein v. State*, 176 Md. 533, 6 A. 2d 465; *Gorman v. State*, 161 Md. 700, 705, 158 A. 903; *McBride v. United States*, 284 F. 416; 4 *American Jurisprudence*, Arrest, p. 22, Sec. 29; *Hochheimer's Criminal Law*, 2d Ed., Sec. 67; *Heyward v. State, supra.*"

The Court of Appeals in the opinion in which it affirmed petitioner's conviction made plain that it was applying the well settled Maryland law which is above set forth. The Court there said (*Griffin v. State*, 92 A. 2d (Adv. Sh.) at pages 745-746):

"Generally, a police officer has no right to break into the privacy of a home and make a search for evidence without a warrant for that purpose. No mere belief that an article sought by law enforcement officers is concealed in a private dwelling furnishes justification for a search of the dwelling without a warrant, even though the facts show probable cause. Accordingly, after the passage of the Bouse Act, the Court of Appeals held in *Gorman v. State*, 161 Md. 700, 158 A. 903, that where a police officer, suspecting a violation of the lottery law in a certain house because of the number of persons entering and leaving it, entered it through an open door without a warrant and seized lottery books and slips found in the house, such articles were procured by illegal search and seizure and were inadmissible in evidence against the householders.

"*Nevertheless, it is the unquestioned law of Maryland that if a misdemeanor is committed in the presence or view of a police officer, he may arrest the offender forthwith without a warrant. Heyward v. State*, 161 Md. 685, 692, 158 A. 897; *Blager v. State*, 162 Md. 664, 666, 161 A. 1; *Callahan v. State*, 163 Md. 298, 301, 162 A. 856; *Silverstein v. State*, 176 Md. 533, 540, 6 A. 2d 465; *Kershaw v. State*, Md., 85 A. 2d 783."

* * * * * *

> *"We specifically hold that it is lawful for a police officer without a warrant to enter and search a dwelling when he can see from the outside that a crime is being committed inside. Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 6, 70 L. Ed. 145; *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 370, 92 L. Ed. 436.
>
> * * * * * *
>
> "Of course, a mere suspicion of an officer that the accused person is committing a misdemeanor in his presence is no justification for an arrest without a warrant. In deciding whether an officer was justified in making an arrest without a warrant for a misdemeanor, the criterion is whether the circumstances presented to the officer through his senses were sufficient to justify a sincere belief that the accused was committing the misdemeanor in his presence. *Peru v. United States,* 8 Cir., 4 F. 2d 881, 883." (Italics supplied.)

The following quotation from the per curiam opinion on Motion for Reargument further illustrates that the Court was applying a well established rule of evidence, 92 A. 2d (Adv. Sh.) at p. 747:

> "* * * We did not broaden the right to arrest without a warrant, but merely undertook to explain, in the circumstances of the instant case, the evidence sufficient to show that a misdemeanor had been committed in the officer's presence. The event showed conclusively that a misdemeanor had been committed in close proximity to the officer. The officer testified that he saw the books and slips used for the purpose of a lottery. Appellant claimed he could not see this. If the officer had been blind, completely intoxicated, or otherwise unconscious, he could not have seen what he testified to. The sentence of which appellant complains merely suggests a measure or test of testimony which an officer may honestly give in the circumstances, and which the trier of facts and this court may

> accept as legally sufficient and true in fact. To this extent we did not subtract from, but added to, the legal requisites of an arrest without a warrant."

Petitioner emphasizes the fact that in the case of *Wood v. State*, 185 Md. 280, 285, 44 A. 2d 859, the Court of Appeals said that the enactment of Article 35, Section 5, *supra*, amounts "to adoption pro tanto of the Supreme Court decisions under the Fourth Amendment". However, the Court of Appeals has consistently refused to follow such decisions where they conflict with well established Maryland law. Thus, in the case of *Johnson v. State*, 193 Md. 136, at page 147, the Court of Appeals said:

> "* * * the decisions in the Federal courts, especially in prosecutions for misdemeanors, are precedents in this State, but *this court is not bound to follow all Federal cases as precedents. Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. page 105; *Weeks v. United States, supra; Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288; *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223; *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986 * * *." (Italics supplied.)

That the above statement was not intended to mean that the Court of Appeals of Maryland would follow all decisions of this Court relative to the Fourth Amendment is illustrated by the recent case of *Rizzo v. State*, ... Md. ...., 93 A. 2d (Adv. Sh.) 280, 282. There the Court rejected the very contention under discussion and said:

> "We are not infrequently reminded by counsel of our statement in *Wood v. State*, 185 Md. 280, 285, 44 A. 2d 859, 861, that 'The Bouse Act and the Act of 1939 amount to adoption *pro tanto* of the Supreme Court decisions under the Fourth Amendment.' The

> context shows that the extent of *pro tanto* was the meaning of 'illegal search and seizure' as dependent upon want of 'probable cause'."

Further, if the Court of Appeals were bound to follow the decisions of this Court relative to illegal search and seizure, there is authority which would support the admissibility in the Federal Courts of evidence similarly secured. See *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 6, 70 L. Ed. 145; *Johnson v. United States,* 333 U. S. 10, 68 S. Ct. 367, 370, 92 L. Ed. 436.

CONCLUSION

It is respectfully submitted that Petitioner was not deprived of his rights under the Constitution of the United States and that, therefore, the petition should be denied.

Respectfully submitted,

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